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ASAHI KOSEI (M) SDN BHD

v.

PETRONAS DAGANGAN BHD

B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA

LIM YEE LAN JCA

HAMID SULTAN ABU BACKER J

[CIVIL APPEAL NO: B-02(IM)-1422-06-2012]

C

25 JANUARY 2013

TORT: Negligence - Vicarious liability - Independent contractor - Whether employer vicariously liable for negligence of independent contractor - Exceptions to general rule - Whether applicable - Whether employer owed direct legal duty - Whether employer could evade duty by delegating performance to third party

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The appellant/plaintiff agreed to purchase liquefied petroleum gas from the respondent/first defendant and the respondent subsequently appointed the second defendant to distribute the petroleum. However, a fire broke out at the appellant's premises while the second defendant's tanker was unloading the petroleum, causing damages. As a result, the appellant commenced an action against the defendants. However, the respondent's application to strike out the appellant's action under O. 18 r. 19(1)(a) or (b) and/or (d) of the Rules of the High Court 1980 or under the inherent jurisdiction of the court was allowed by the High Court and hence, the appeal by the appellant. The central contention of the appellant was that it was plainly wrong for the learned judge to strike out the appellant's claim based on the respondent's contention that an employer could not be held vicariously liable for negligence of an independent contractor in the execution of the latter's duties without considering the exceptions to the general rule which was applicable in the instant case.

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Held (allowing appeal with costs)**Per Hamid Sultan Abu Backer J delivering the judgment of the court:**

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(1) It is trite that the general principles relating to liability on an action against third parties in negligence and contracting parties may vary. The contractual terms itself may extend or limit the scope of duty of care which the court must give

effect to in deciding liability and, if applicable, also quantum (A
(*Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* (refd);
Lister v. Romford Ice and Cold Storage Co Ltd (refd)). (para 9)

- (2) At times, the contractual provision will impose a direct legal
duty to the relevant parties which may not be delegated. It B
was for the trial court to determine whether the respondent
owed the legal duty complained of to the appellant. In the
instant case, there were contractual terms between the
appellant and the respondent and also between the respondent
and the second defendant which might be an important factor C
to decide on the issue of liability. (para 9)

Bahasa Malaysia Translation Of Headnotes

Perayu/plaintif telah bersetuju untuk membeli gas petroleum cair
daripada responden/defendan pertama dan responden kemudiannya D
melantik defendan kedua untuk mengedar petroleum tersebut.
Walau bagaimanapun, kebakaran berlaku di premis perayu semasa
tangki defendan kedua sedang memunggah petroleum tersebut,
mengakibatkan kerugian. Dengan itu, perayu memulakan tindakan
terhadap defendan-defendan. Walau bagaimanapun, permohonan E
responden untuk membatalkan tindakan perayu di bawah A. 18
k. 19(1)(a) or (b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi
1980 atau di bawah bidang kuasa sedia ada mahkamah dibenarkan
oleh Mahkamah Tinggi dan dengan itu, rayuan ini oleh F
perayu. Hujahan utama perayu adalah bahawa adalah jelas khilaf
bagi yang arif hakim membatalkan tuntutan perayu berdasarkan
kepada hujahan responden bahawa majikan tidak boleh
dipertanggungjawabkan secara vikarius bagi kecuaian kontraktor
bebas dalam pelaksanaan tanggungjawab kontraktor bebas tanpa G
mempertimbangkan pengecualian terhadap peraturan am yang
beraplikasi dalam kes ini.

Diputuskan (membenarkan rayuan dengan kos)

**Oleh Hamid Sultan Abu Backer H menyampaikan
penghakiman mahkamah:** H

- (1) Adalah matan bahawa prinsip-prinsip am berkaitan liabiliti atas
tindakan terhadap pihak ketiga bagi kecuaian dan pihak-pihak
berkontrak mungkin berbeza. Terma-terma kontrak itu sendiri
boleh dilanjutkan atau menghadkan skop kewajipan berjaga-jaga I
yang mahkamah perlu memberi pertimbangan dalam
menentukan liabiliti, dan jika terpakai, juga kuantum (*Leolaris
(M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* (dirujuk); *Lister
v. Romford Ice and Cold Storage Co Ltd* (dirujuk)).

- A (2) Kadang-kala, peruntukan kontrak akan mengenakan kewajiban undang-undang secara langsung kepada pihak-pihak yang relevan yang tidak boleh ditugaskan kepada orang lain. Adalah bagi mahkamah perbicaraan untuk menentukan sama ada responden mempunyai kewajiban dari segi undang-undang yang
- B seperti diadukan terhadap perayu. Dalam kes ini, terdapat terma-terma kontrak antara perayu dan responden dan juga antara responden dan defendan kedua yang mungkin menjadi faktor penting untuk memutuskan isu liabiliti.
- C **Case(s) referred to:**
Burnie Port Authority v. General Jones Pty Limited [1994] 4 CLJ 1 HC (*refd*)
Century Insurance Co Ltd v. Northern Ireland Road Transport Board [1942] 1 All ER 491 (*refd*)
Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd [2012] 6 CLJ 423 HC (*refd*)
Lister v. Romford Ice and Cold Storage Co Ltd [1957] AC 555 (*refd*)
Rowe v. Herman & Ors [1997] 58 CONLR 38 (*refd*)
Wu Siew Ying v. Gunung Tungal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC (*refd*)
- E **Legislation referred to:**
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)
For the appellant - Tan Tai Hwa; M/s Tai Hwa & Co
For the respondent - Faisal Moideen (Max Tai with him); M/s Moideen & Max
- F [Appeal from High Court Malaya, Shah Alam; Suit No: 22NCVC-987-2011]
Reported by S Barathi

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JUDGMENT

Hamid Sultan Abu Backer J:

- H [1] This is our judgment in respect of the appellant/plaintiff's appeal against the decision of the learned High Court Judge who allowed the respondent/first defendant's application under O. 18 r. 19(1)(a) or (b) and/or (d) or under the inherent jurisdiction of the court. We heard the appeal on 3 December 2012 and we
- I allowed the appeal with costs. My learned brother, Hishamudin Mohd Yunus JCA and my learned sister, Lim Yee Lan JCA have read the judgment and approved the same.

[2] The central contention of the appellant is that it was plainly wrong for the learned judge to strike out the plaintiff's claim based on the respondent's contention that an employer cannot be held vicariously liable for negligence committed by an independent contractor in the execution of the latter's duties without considering the exceptions to the general rule which is applicable in the instant case.

Brief Facts

[3] By a sale and purchase agreement the appellant agreed to purchase liquefied petroleum gas from the respondent. There are several terms in the sale and purchase agreement imposing obligations for safe delivery with a right to assign by either party with a strict term stating that:

that nothing herein shall relieve the assigning party of its duties and liabilities in the event of any breach of contract on the part of such assignee company.

[4] Subsequently the respondent had by an agreement appointed the second defendant to distribute the petroleum. On or about 5 September 2005 a fire broke out at the appellant's premises when the second defendant's tanker was unloading the petroleum. The tanker driver as well as one of the employees of the appellant died in consequence of the fire and hence the plaintiff's action against the defendants.

[5] It is the contention of the respondent that the second defendant is an independent contractor and in consequence is not liable for negligence of the independent contractor, in reliance of the Federal Court's decision of *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409; [2011] 2 MLJ 1 where it was held:

... an employer is not responsible for the torts committed by an independent contractor in the course of the execution of the works.

[6] The respondent also relies on the English Court of Appeal's decision in *Rowe v. Herman & Ors* [1997] 58 CONLR 38 where the first defendant's application to strike out on the grounds that the first defendant was not liable for the negligence of the independent contractor was allowed.

- A [7] The respondent further relies on the House of Lords' decision in *Century Insurance Co Ltd v. Northern Ireland Road Transport Board* [1942] 1 All ER 491 where liability of road tanker drivers and transportation company that employs them was considered. On the facts the court found liability on the independent contractor and held that the negligence was attributed to the lorry driver.

- C [8] It is the contention of the appellant that there are two exceptions or apparent exceptions to the general rule that an employer is not liable for tort committed by his independent contractor and relies on the Australian High Court judgment of Brennan J in the case of *Burnie Port Authority v. General Jones Pty Limited* [1994] 4 CLJ 1 where it was stated:

- D There are two exceptions, or apparent exceptions, to the general rule that an employer is not liable for a tort committed by his independent contractor: the first, when the employer directly authorizes "the doing of the act which amounts to a tort"; the second, when the employer engages the independent contractor to perform a duty resting on the employer and the independent contractor fails to perform it. Where the employer is sought to be made liable for the negligent conduct of an independent contractor but that conduct has not been authorized by the employer and is not breach of a duty of care resting personally on the employer, the negligence is said to be "collateral" (Lord Blackburn used the term in *Dalton v. Angus* [1881] 6 App Cas 740 at 829, it had been used by Pollock C.B. in *Hole v. Sittingbourne and Sheerness Railway Co* [1861] 6 H & N 488 at 497 [158 ER 201 at 204]) and creates no liability in the employer.

- G In some cases where an employer is held liable for the tort of an independent contractor, the ground of liability can be seen clearly to be either authorization of a negligent act (as in *Black v. Christchurch Finance Co.* [1894] AC at 54; *McInnes v. Wardle*) or non-performance of an employer's personal duty (as in *The Commonwealth v. Introvigne* [1982] 150 CLR 258 at 270-271, 274-275, 279-280) but the two grounds coalesce where the doing by an independent contractor of an act authorized by the employer gives rise to a duty resting on the employer personally.

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In such a case, the relevant principle is that stated by Mason J in *Stoneman v. Lyons* [1975] 133 CLR 550 at 574:

Although the general rule is that a person is not liable for the negligence of his independent contractor, it is accepted that a person who owes a duty to a third party cannot avoid responsibility for discharging that duty by delegating performance of it to an independent contractor.

[9] We have read the appeal record and submission of the parties in detail. Both learned counsel have filed a comprehensive submission on the law and facts. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons, *inter alia*, are as follows:

(a) It is trite that the general principles relating to liability on an action against third parties in negligence and contracting parties may vary. The contractual terms itself may extend or limit the scope of duty of care which the court must give effect to in deciding liability and, if applicable, also quantum (see *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2012] 6 CLJ 423; [2013] 7 MLJ 25; *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] AC 555).

(b) Even in the case of *Century Insurance* which the respondent had relied on, the House of Lords went to consider the contractual terms of the relevant parties before deciding on the issue of liability in negligence. The case was not dealt purely on tortious principles alone. At times the contractual provision will impose a direct legal duty to the relevant parties which may not be delegated. It all depends on the facts. And it is for the trial court to determine whether the respondent in this particular case owes the legal duty complained of to the appellant. In the instant case, it must not be forgotten there are contractual terms between the appellant and respondent and also between the respondent and second defendant which may be an important factor to decide on the issue of liability (see *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2012] 6 CLJ 423; [2013] 7 MLJ 25). In this respect, the appellant's submission, *inter alia*, which states:

There are 2 classes of duties - (i) a duty to take reasonable care and (ii) a duty to see that care is taken. It may well be that in the former there is in general no liabilities for the breach of an

- A independent contractor, but in the latter there is. In the latter
duty, the law actually imposes a duty irrespective of negligence
as the liability is strict or absolute. This is because where the
act which the independent contractor employed to do is one of
the kind which the employer does at his own peril, so that the
existence of negligence is immaterial. It is no defence that the
cause of the mischief was the negligence of an independent
contractor by whose agency the act was done. Here, the
Respondent is under a duty, he is liable is that duty is not
performed by itself and damage thereby results. The Respondent
cannot evade that liability by delegating the performance of that
duty to the 2nd Defendant.
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[10] For reasons stated above, the appeal is allowed with costs.
The judgment of the High Court is set aside and early date is to
be fixed for case management in the High Court. The respondent
to pay the appellant costs in the sum of RM5,000. We hereby
order so.

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